UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EDWIN N. GONZALEZ,

Plaintiff,

vs.

JOHN DOE, et. al.,

Defendants.

CASE NO.07-CV-1962 W(POR)

ORDER:

1) ADOPTS THE REPORT AND RECOMMENDATION (Doc. No. 43.)

2) GRANTS DEFENDANTS' MOTION TO DISMISS (Doc. No. 35.)

On October 10, 2007, Plaintiff Edwin N. Gonzalez ("Plaintiff"), a state prisoner proceeding *pro se* and *in forma pauperis*, commenced this action seeking relief under 42 U.S.C. § 1983. (Doc. No. 1.) Plaintiff filed his Second Amended Complaint ("SAC") on November 5, 2009. (Doc. No. 32.) On December 18, 2009, Defendants John Doe, et. al. (collectively "Defendants") filed a motion to dismiss. (Doc. No. 35.) On July 28, 2010, Magistrate Judge Louisa S. Porter filed a Report and Recommendation ("Report"), recommending that the Court grant Defendants' motion and dismiss the SAC in its entirety. (Doc. No. 43.)

On August 17, 2010, Plaintiff timely filed his objections to the Report.[1] (Doc. No. 45.) Defendants filed their reply on September 9, 2010. (Doc. No. 46.) The Court decides the matter on the papers submitted and without oral argument. See Civil Local Rule 7.1(d.1). For the reasons outlined below, the Court **ADOPTS** the Report and **GRANTS** Defendants' motion to dismiss.

I. BACKGROUND

Plaintiff is a prisoner currently incarcerated at Ironwood State Prison, proceeding *pro se* and *in forma pauperis* on his Second Amended Complaint ("SAC") filed pursuant to 42 U.S.C. § 1983. (Doc. No. 32 at 1.) Defendants are a collection of correctional officers, counselors, and supervising administrators at Calipatria and Ironwood State Prisons. (*Id.* at 3.) The following description of events is taken from the parties' pleadings and is not to be construed as findings of fact by the Court.

On January 4, 2006, while Plaintiff was an inmate at Calipatria State Prison, he was questioned by Defendant Tamayo about yard incidents and a list of inmates' names found in his personal belongings. (*Id.* at 6.) Plaintiff explained that the list was for the purpose of filing a group appeal on the basis of religion. (*Id.* at 6.) Plaintiff denied knowledge of the yard incidents, but Defendant Tamayo allegedly told Plaintiff if "he has to go again for [P]laintiff, that this time things were going to be like the 'old days,' and that [Defendant Tamayo] personally would go inside [P]laintiff's cell and drag him out for his actions." (*Id.* at 6.)

On January 6, 2006, Defendant Preciado searched Plaintiff's cell and stated that prison officials had received confidential information from an informant concerning Plaintiff. (*Id.* at 7.) When the search did not reveal anything to corroborate the information, Defendant Preciado informed Plaintiff that "the confidential information

[1] This Court actually filed the document on August 30, 2009. However, this Court gives Petitioner the benefit of the "mailbox rule" which deems that a petition is constructively filed when it is delivered to prison officials for filing. Houston v. Lack, 487 U.S. 266 (1988).

is no longer credible and will no longer be considered." (*Id.* at 7.)

Plaintiff was subsequently transferred to Ironwood, where he learned that confidential information had been placed in his prison file. (*Id.* at 7.) He submitted a 602 appeal requesting to see the confidential information, or in the alternative, that the information be removed or corrected. (SAC at *Exh.* C5.) Defendant Bates denied the appeal at the informal level on June 17, 2006. (*Id.*)

On July 17, 2006, Defendant Rettagliata denied Plaintiff's appeal at the first formal level. (*Id.* at *Exh.* C6.) As part of the procedure for that decision, Defendant Retaggliatta interviewed Plaintiff. (SAC at 8.) Defendant Retaggliatta allegedly asked Plaintiff why he was concerned about the contents of his file if he was a "lifer," and said the information would remain in Plaintiff's record because prison officials at Calipatria State Prison had "found Plaintiff guilty in part." (*Id.* at 8.) This comment confused Plaintiff because he maintains that he had never been charged with any misbehavior at Calipatria. (*Id.* at 8.)

On September 18, 2006, Defendants Payton and Ryan denied Plaintiff's appeal at the second formal level. (*Id.* at *Exh.* C3.) Finally, on December 28, 2006, Plaintiff's appeal was denied at the Director's Level, which held Plaintiff did not have a right to view the confidential portion of his file. (*Id.* at *Exh.* C1.) That decision, in part, reads:

> The appellant is advised that he does not have the right to view the confidential portion of his C-File... The memorandum was approved for placement in [Plaintiff's] Confidential Folder within his C-file. Before authorizing this placement, the approving authority ensured that the memorandum contained the necessary elements to establish it as "confidential." Information which, if known to the inmate, would endanger the safety of any person or information which would jeopardize the security of the institution must be kept confidential. Pursuant to the CCR 3450(d), "No inmate or parolee shall prepare, handle, or destroy any portion of a departmental record containing confidential information as that term is defined in Section 3321.

(*Id.*)

While his second level appeal was pending, some prisoners assaulted Plaintiff at Ironwood. (SAC at 9.) He sustained serious wounds and was placed in a medical unit. (*Id.* at 9.) While Plaintiff was receiving medical care, Defendant Payton told Plaintiff he was being placed under contraband watch[2] due to the confidential information in his file. (*Id.* at 9.) Plaintiff remained on contraband watch for four days. (*Id.* at 9.)

On March 12, 2008, Plaintiff filed a First Amended Complaint ("FAC"), seeking relief under 42 U.S.C. § 1983, alleging that prison officials deprived him of his Fourteenth Amendment Due Process rights by placing and maintaining false confidential information in his prison file. (Doc. No. 9.) On July 2, 2009, the Court granted Defendants' motion to dismiss without prejudice. (Doc. No. 31.)

On November 5, 2009, Plaintiff filed a Second Amended Complaint ("SAC") against the following Defendants in their official and individual capacities: F. Hector, Associate Warden; S.J. Ryan, Deputy Warden; M.D. Payton, Facility Captain; Y. Rettagliatta, Correctional Counselor; R. Bates, Correctional Counselor; Preciado, Correctional Sergeant; and Tamayo, Correctional Officer. (Doc. No. 32.) Defendants Hector, Ryan, Payton, and Rettagliatta are employed at Ironwood, and Defendants Preciado and Tamayo are employed at Calipatria. (*Id.* at 3-4.)

In his SAC, Plaintiff asserts three claims: (1) a First Amendment violation because Defendants retaliated against him for filing grievance appeals; (2) an Eighth Amendment violation because Defendants "subject[ed] Plaintiff to the tortures of 'potty watch' [contraband watch surveillance];" and (3) a Fourteenth Amendment Due Process violation because Defendants placed and maintained false confidential information in his file. (SAC at 10-17.) Plaintiff seeks injunctive and declaratory relief, as well as compensatory, punitive, nominal, and mental anguish damages, and attorneys' fees and costs. (*Id.* at 18-19.)

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[2] Under Ironwood State Prison's Operation Procedure No. 096, "contraband watch surveillance" is the "[t]emporary detention and safe recovery of contraband concealed within any body cavity." (*Defs.' Req. for Judicial Notice Ex.* A, Doc. No. 25.)

On December 18, 2009, Defendants filed a motion to dismiss Plaintiff's SAC. (Doc. No. 35.) Defendants present seven grounds to dismiss the action: (1) that Plaintiff has failed to exhaust his administrative remedies; (2) that Defendants are immune from suits in their official capacities under the Eleventh Amendment; (3) that Plaintiff has failed to state a sufficient claim for First Amendment retaliation against any of the Defendants; (4) that Plaintiff has failed to state an Eighth Amendment claim; (5) that Plaintiff has failed to state a Fourteenth Amendment due process claim; (6) that qualified immunity protects Defendants from liability for damages in their individual capacities;[3] and (7) that Plaintiff's request for injunctive relief is moot against Defendants who do not work at Ironwood State Prison. (*Defs.' Mot. to Dismiss* at 2, Doc. No. 35.)

On July 28, 2010, Magistrate Judge Porter issued her Report. (Doc. No. 43.) On August 17, 2010, Plaintiff filed his objection to the Report. (Doc. No. 45.) Defendants filed their reply on September 9, 2010. (Doc. No. 46.)

II. LEGAL STANDARD

A. Review of Magistrate Judge's Report

The duties of a district court in connection with a magistrate judge's report and recommendation are set forth in Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1). The district court "must make a *de novo* determination of those portions of the report ... to which objection is made," and "may accept, reject, or modify,

[3] As the Report correctly noted, although Defendants list qualified immunity as a ground for dismissal separate from Plaintiff's failure to state constitutional claims under the First, Eighth, and Fourteenth Amendments, the issues are inextricably linked. Specifically, qualified immunity requires two elements, the first of which is Plaintiff's failure to state a constitutional claim. Saucier v. Katz, 533 U.S. 194, 201 (2001). Thus, as part of its analysis of qualified immunity, the Court will address whether Plaintiff has sufficiently alleged constitutional violations under the First, Eighth, and Fourteenth Amendments.

in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1)(C); see also United States v. Raddatz, 447 U.S. 667, 676 (1980); United States v. Remsing, 874 F.2d 614, 617 (9th Cir. 1989).

B. Motion to Dismiss

A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims in the complaint. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999). "The old formula—that the complaint must not be dismissed unless it is beyond doubt without merit—was discarded by the Bell Atlantic decision [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 n.8 (2007)]." Limestone Dev. Corp. v. Vill. of Lemont, 520 F.3d 797, 803 (7th Cir. 2008).

A complaint must be dismissed if it does not contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp., 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, __U.S. __, 129 S.Ct. 1937, 1949 (2009). The court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them, and must construe the complaint in the light most favorable to the plaintiff. Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 973 (9th Cir. 2004) (citing Karam v. City of Burbank, 352 F.3d 1188, 1192 (9th Cir. 2003)); Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995); N.L. Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

Where a plaintiff appears *in propria persona* in a civil rights case, the court must also be careful to construe the pleadings liberally and afford plaintiff any benefit of the doubt. See Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988). However, at a minimum, even a *pro se* plaintiff must allege with at least some degree of particularity over acts which defendants engaged in that support his claim. Jones v. Community Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984).

III. DISCUSSION

As a preliminary matter, the Court notes that Petitioner filed an objection to the Report. (Doc. No. 13.) Thus, a *de novo* review is required. 28 U.S.C. § 636(b)(1)(c)); see also United States v. Raddatz, 447 U.S. 667, 676 (1980); United States v. Remsing, 874 F.2d 614, 617 (9th Cir. 1989).

Plaintiff objects to the Magistrate Judge's following conclusions: (1) that he has failed to exhaust his administrative remedies with respect to his First and Eighth Amendment claims; (2) that he has failed to state a First Amendment retaliation claim against Defendants Bates, Ryan, Rettagliatta, and Payton; (3) that he has failed to state an Eighth Amendment claim against Defendants Payton and Ryan; and (4) that he has failed to state a Fourteenth Amendment Due Process claim against all Defendants. (*Pl.'s Obj.* at 2, Doc. No. 45.) The Court will address the recommendations that were dispositive in the present ruling.

A. Exhaustion

Citing Griffin, the Report concluded that Plaintiff failed to exhaust his administrative remedies with regard to his First and Eighth Amendment claims because he did not provide sufficient notice of either claim in his administrative appeal. (*Report* at 9.)

The Prison Litigation and Reform Act states that "no action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other federal law, by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Exhaustion is required prior to the filing of any prisoner lawsuit concerning prison life, whether the claims involve general conditions or specific incidents and whether they allege excessive force or some other wrong. Porter v. Nussle, 534 U.S. 516, 532 (2002).

The State of California provides its prisoners and parolees the right to administratively appeal any departmental decision, action, condition or policy perceived by those individuals as adversely affecting their welfare. Cal. Code Regs. tit. 15,

§ 3084.1(a). Exhausting the administrative remedies involves several steps: (1) informal resolution, (2) formal written appeal on a CDC 602 inmate appeal form, (3) "second level appeal" to the institution head or designee, and finally (4) "third level appeal" to the Director of the California Department of Corrections. Barry v. Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. 15, § 3084.5). The third level, or "Director's Level," of review shall be final and exhausts all administrative remedies available in the Department of Corrections. Cal. Dep't of Corrections Operations Manual § 54100.11, "Levels of Review"; Barry, 985 F. Supp. at 1237–38; Irvin v. Zamora, 161 F. Supp. 2d 1125, 1129 (S.D. Cal. 2001). In addition to pursuing all four levels of appeal, a prisoner must also "compl[y] with the system's critical procedural rules" in order to achieve proper exhaustion. Woodford v. Ngo, 548 U.S. 81, 95 (2006).

Additionally, a prisoner must exhaust his administrative remedies properly. Id. at 93. "[W]hen a prison's grievance procedures are silent or incomplete as to factual specificity,[4] 'a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought.'" Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009) (quoting Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002)).

1. First Amendment Retaliation Claim.

In his objection, Plaintiff argues that the Report "completely overlooks the fact that Plaintiff does not speak, write, or understand English." (Doc. No. 45 at 7.) Alternatively, Plaintiff argues that he provided sufficient notice of the First Amendment claim in his 602 grievance at the Director's level appeal. (SAC at 9, *Exh.* C12.) The Court disagrees.

[4] The California Regulations require only that a prisoner "shall use a CDC Form 602 Inmate/Parolee Appeal Form to describe the problem and action requested." Cal. Code Regs. tit. 15, § 3084.2(a). Furthermore, the 602 grievance form does not require a prisoner to name or identify specific prison officials. Id.; see also Lewis v. Mitchell, 416 F. Supp. 2d 935, 941-42 (S.D. Cal. 2005).

First, the Court is unpersuaded that Plaintiff's unfamiliarity with the English language is a valid excuse for failing to satisfy the statutory exhaustion requirements. From the numerous documents before the Court, it appears that Plaintiff had, at all times, the assistance of a translator. (*See e.g.* SAC, *Exh. A* at 1,3-4.)

More importantly, as further explained in the Report, neither Plaintiff's grievance, nor his appeals, provided notice of his retaliation claim. (*Report* at 9.) Even construed liberally, Plaintiff's comments in his Director's level appeal can not be read as anything more than claims regarding the seriousness of having false confidential information in a prison file, which does not provide notice that the grievances involved retaliation. (See SAC at *Exh.* at C12; *see also* Doc. No. 46 at 2:11–17.) But even if the Court did construe the comments that way, Plaintiff has still not shown that he pursued his First Amendment retaliation claim at all four levels of appeal, which means that he has still failed to properly exhaust his administrative remedies. See Woodford, 548 U.S. at 95.

In sum, Plaintiff failed to provide prison officials with sufficient notice of a claim that he was being retaliated against for filing prison grievances. See Griffin, 557 F.3d at 1120. As such, the Court **OVERRULES** Plaintiff's objection and **ADOPTS** the Report's conclusion that Plaintiff has not exhausted his administrative remedies in regards to his First Amendment claim. (*Report* at 9.) Accordingly, Plaintiff's First Amendment claim of retaliation is **DISMISSED**.[5]

2. Eighth Amendment Claim

Similarly, Plaintiff objects to the Report's conclusion that he failed to exhaust his administrative remedies in regards to his Eighth Amendment claim. Curiously, Plaintiff appears to concede that his appeals (up until the Director's level) did not contain any complaints regarding the contraband surveillance watch. (Doc. No. 45 at 12.) Nevertheless, Plaintiff contends that he personally informed Defendant Ryan of the

[5] In light of this conclusion, the Court finds it unnecessary to discuss the well-reasoned analysis contained in the Report regarding the factual sufficiency of Plaintiff's First Amendment allegations. (*See Report* at 10–15.)

attack and the contraband surveillance order by Defendant Payton, which this Court should consider to be sufficient exhaustion.[6] (*Id.* at 12.) The Court disagrees.

A "grievance need not include legal terminology or legal theories" but it must notify the prison of a problem. Griffin, 557 F.3d at 1120. As noted by the Report, Plaintiff did not mention the contraband surveillance watch underlying his Eighth Amendment claim until the Director's level appeal. And because the issue had not been raised previously, it was beyond the scope of what could be reviewed at that level. See 15 CCR § 3084.5(d); Doc. No. 46 at 2–3. Moreover, Plaintiff has not provided any legal authority to substantiate his claim that oral notification of a grievance would be sufficient to establish exhaustion through the administrative process. Thus, the Court concludes that Plaintiff failed to provide prison officials with sufficient notice of a claim involving the contraband surveillance watch. See Griffin, 557 F.3d at 1120.

In sum, the Court **OVERRULES** Plaintiff's objection and **ADOPTS** the Report's conclusion that Plaintiff has not exhausted his administrative remedies in regards to his Eighth Amendment claim. (*Report* at 9.) Accordingly, Plaintiff's Eighth Amendment claim is **DISMISSED**.[7]

B. Failure to State a Fourteenth Amendment Due Process Claim.

The Report concluded that Plaintiff had failed to allege an "atypical and significant hardship" and that his claims of prospective harm – based on the confidential information in his file – were too speculative to invoke due process protections. (*Report* at 17-18.) In the alternative, even if Plaintiff had alleged a protected liberty interest in

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[6] Plaintiff contends that he "personally informed" Defendant Ryan of the Eighth Amendment claim, and that Defendant Ryan failed to include this in his second formal level response. (*Pl.'s Obj.* at 12, Doc. No. 45.) Significantly, Plaintiff does not contend that this claim was brought in his earlier appeals.

[7] In light of this conclusion, the Court finds it unnecessary to discuss the well-reasoned analysis contained in the Report regarding the factual sufficiency of Plaintiff's Eighth Amendment allegations. (*See Report* at 15–17.)

accurate prison records,[8] the Report states that Plaintiff still failed to allege that he was deprived of that interest without due process of law. (*Id.* at 18–19.) The Court agrees.

In order to successfully bring a claim under the Fourteenth Amendment's Due Process Clause, Plaintiff must establish a constitutionally protected liberty or property interest at stake. See Ingraham v. Wright, 430 U.S. 564, 569 (1972). Once a liberty interest has been found, the court will then determine the process an inmate is due. See Wilkinson v. Austin, 545 U.S. 209, 224-25 (2005).

1. Liberty Interest

As explained more fully in the Report, under the Fourteenth Amendment prisoners are afforded certain due process protections when charged with a disciplinary violation. Wolff v. McDonnell, 418 U.S. 539, 564-71 (1973). However, such protections apply only when the disciplinary action implicates the liberty interest in some "unexpected manner" or imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin, 515 U.S. at 484; see also Ramirez v. Galaza, 334 F.3d 850, 860 (2003).

Plaintiff continuously claims that he was unjustifiably subjected to contraband surveillance watch as a result of the false information in his file. As this Court previously explained, however, Plaintiff must allege a factual comparison between the specific disciplinary action taken and the typical course of action. (See Doc. No. 31 at 6; citing Sandin v. Conner, 515 U.S. 472, 483–484 (1995)). Despite this warning, Plaintiff did not allege any material differences between contraband surveillance watch and administrative segregation.[9] It is also worth noting that Plaintiff did not allege that other

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[8] As mentioned in the Report, neither the Supreme Court nor the Ninth Circuit has decided the issue of whether a prisoner has a liberty interest in accurate prison record information. (*Report* at 17 n.9)

[9] In his objection, Plaintiff addresses, for the first time, material differences between contraband watch surveillance and administrative segregation. In Reply, Defendants contend that Plaintiff's "belated attempt" to amend his pleadings should not be regarded. (Doc. No. 46 at 3–4.) Considering Plaintiff was aware of this deficiency at

prisoners who had been involved in a similar yard incident were not subjected to contraband surveillance. (SAC at 9.) Thus, Plaintiff has not demonstrated that he suffered an atypical and significant hardship in relation to ordinary incidents of prison life. (*Report* at 17-18.)

Additionally, the Court believes that Plaintiff's claims of prospective harm – based on the confidential information in his file – are too speculative to invoke due process protections. (*See Report* at 18.) The SAC does not allege that the Parole Board has relied on any false information or that Plaintiff has actually been denied from any rehabilitative program as a result of that information. (SAC at 8.) Notably, Plaintiff has not objected to this conclusion. As such, Plaintiff's speculative claims do not establish a protected liberty interest, and thus, "due process protections" do not apply. Sandin, 515 U.S. at 484.

2. Procedural Protection

Even if Plaintiff was able to establish the presence of a liberty interest, the Court agrees with the Report's finding that Plaintiff was not deprived due process of law. (*Report* at18–19.) The SAC and the attached exhibits show that Plaintiff was given notice that the confidential information was in his file and that he was afforded the ability to challenge that information at the various administrative levels. Plaintiff's objection about the deference afforded to prison administrators has done nothing to upset this legal conclusion. (*See* Doc. No. 45 at 13.)

In sum, the Court **OVERRULES** Plaintiff's objection and **ADOPTS** the Report's conclusion that Plaintiff has failed to sufficiently allege a claim under the Fourteenth Amendment. (*Report* at 19.) Accordingly, Plaintiff's Fourteenth Amendment claim is **DISMISSED**.

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the time of his last amendment, the Court agrees. See Doc. No. 31 at 6; citing Sandin, 515 U.S. at 483–484.

C. Plaintiff's Claim For Injunctive Relief Is Moot.

Lastly, because the Court has dismissed each of Plaintiff's three causes of action, and because Plaintiff has not objected to the Report's analysis, the Court **ADOPTS** the Report's conclusion that the claim for injunctive relief is moot. As such, the Court **DISMISSES** Plaintiff's request for injunctive relief. (See *Report* at 19.)

IV. CONCLUSION AND ORDER

For the reasons cited above, and for the reasons expressed in the Report which are incorporated herein by reference, the Court **OVERRULES** Plaintiff's objection (Doc. No. 45), **ADOPTS** the Report in its entirety (Doc. No. 43), and **GRANTS** Defendants' motion to dismiss. (Doc. No. 35.)

Because the Court has already afforded Plaintiff several opportunities to amend his complaint, the Court dismisses this case in its entirety as to all Defendants **WITHOUT LEAVE TO AMEND**. (See *Report* at 20.)

IT IS SO ORDERED.

DATED: September 20, 2010

Hon. Thomas J. Whelan
United States District Judge